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By Hand Delivery

Secretary Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

Re: Rules and Regulations Implementing the Telephone Consumer
Protection Act (TCPA) of 1991 – CG Docket No. 02-278

Dear Secretary Dortch:

This reply comment letter is submitted on behalf of Visa in response to the Notice of Proposed Rulemaking ("NPR") issued by the Federal Communications Commission ("FCC" or "Commission") under the Telephone Consumer Protection Act ("TCPA") of 1991. The NPR invited comments on the creation of a national do-not-call list. We appreciate the opportunity to provide additional comments on this issue.

The Visa Payment System, of which Visa U.S.A.¹ is a part, is the largest consumer payment system in the world, with more volume than all other major payment cards combined. Visa plays a pivotal role in advancing new payment products and technologies to benefit its 21,000 member financial institutions and their hundreds of millions of cardholders worldwide.

Although Visa generally supports the concept of a national do-not-call list, there are significant statutory, constitutional and practical issues that need to be resolved before any such list can be implemented. Visa believes that these considerations require the FCC independently to evaluate the creation of a national do-not-call list under the standards set forth in the TCPA and the

¹ Visa U.S.A. is a membership organization comprised of U.S. financial institutions licensed to use the Visa service marks in connection with payment systems.

standards articulated in *Central Hudson Gas & Elec. Corp. v. Public Service Commission* (“*Central Hudson*”).² Visa further believes that if a national do-not-call list is established, it must be a single list that operates under a single set of federal rules and that conflicting state laws must be preempted to the maximum extent possible.

In this regard, Visa notes that since the FCC issued the NPR, the Federal Trade Commission (“FTC”) has released the final amendments to its Telemarketing Sales Rule (“TSR”), establishing a national do-not-call list under the Telemarketing Consumer Fraud and Abuse Prevention Act (“TCFAPA”). Visa believes that the TCPA, the basis on which the FCC has requested comment, represents a far more definitive statement of congressional intent with respect to the establishment of a national do-not-call list than the TCFAPA. Accordingly, the TCPA should form the basis of any federal effort to establish a national do-not-call list. Additionally, Visa urges the FCC to exercise preemption of state laws, as contemplated by the TCPA, to the maximum extent possible.

Visa’s reply comments regarding a single national do-not-call list and the constitutional, statutory and practical considerations are set forth below.

A. Balancing Consumers’ Privacy Interests and Commercial Interests

Both the TCPA and constitutional standards for placing restrictions on commercial speech established by *Central Hudson* require a careful balancing of the commercial speech interests relating to telemarketing and the consumer privacy interest that the TCPA requires the FCC to address. In the TCPA, Congress found that “[i]ndividuals’ privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.”³ In addition, the TCPA directs the FCC to “compare and evaluate alternative methods and procedures” for protecting consumers’ privacy rights and to “implement the methods and procedures that the Commission determines are most effective and efficient.”⁴ Under *Central Hudson*, the comparison and evaluation of alternate methods of addressing privacy under the TCPA must consider: (1) how any restrictions that will be imposed on legitimate commercial speech in the form of telemarketing will advance the privacy interest identified by the TCPA; and (2) whether this privacy interest could be served as well by a more limited restriction on commercial speech.⁵

² 447 U.S. 557 (1980).

³ 47 U.S.C. § 227 note.

⁴ See 47 U.S.C. §§ 227(c)(1)(A)–(E); see also NPR ¶ 1.

⁵ 447 U.S. at 564.

Consistent with these requirements in 1992, when the FCC first implemented the rules and regulations governing telephone solicitations, the Commission preferred the company-specific approach of a do-not-call registry to a national approach. The Commission did not simply choose one approach over the other; instead, the Commission balanced consumers' privacy interests with the right to conduct telemarketing practices. As noted in the NPR ¶ 1, the FCC determined in 1992 that a company-specific approach to a do-not-call registry sufficiently balanced consumer interests in limiting the number of telemarketing calls with telemarketers' interests in providing beneficial services to consumers. If the FCC now deems that a national do-not-call standard is preferred to the existing company-specific standard, the Commission needs to establish that the creation of a national do-not-call list is necessary to protect privacy interests, and that this protection could not be as well served by a more limited restriction such as modification of the procedures that apply to the current company-specific lists. In evaluating the privacy interests to be protected, the FCC needs to consider the extent to which telemarketing calls truly reflect an invasion of privacy, as opposed to a means for consumers to conduct economic transactions that they believe are in their interest. For example, the FCC could establish a national do-not-call registry if it found that there would be no, or few, economic transactions affected by the registry and that the registry would promote consumer privacy interests. On the other hand, if the registry would affect a significant volume of actual transactions, the existence of those transactions would call into question the extent to which the national do-not-call registry is actually promoting privacy interests, and whether the privacy interest would be served as well by a more limited restriction. In such circumstances, alternate approaches should be considered.

In this regard, there is evidence that state do-not-call lists have significantly reduced telemarketing sales transactions. For example, MBNA notes in its comment letter to the FCC that "MBNA has experienced a 50% decrease in telemarketing sales in the states that have enacted DNC (do-not-call) laws."⁶ This decrease in telemarketing sales conflicts with the oft-heard assertion that do-not-call laws do not affect sales because consumers on do-not-call lists would not make purchases from any telemarketer. Clearly, had those consumers, who ultimately registered their names and telephone numbers on the do-not-call registries, chosen instead to receive telemarketing calls, the percentage of telemarketing sales would not have declined. Moreover, there is additional evidence that certain products and services have greater numbers of sales when sold over the telephone. For instance, MBNA also notes in its comment letter that over \$4 billion in balance transfers or credit card accounts resulted from telemarketing calls where the consumer previously had failed to respond to direct

⁶ See Revised Comment Letter from MBNA to Federal Communications Commission, Dec. 10, 2002, at 3.

mail offers.⁷ These significant figures demonstrate that do-not-call lists based on a central registry, as opposed to company-specific lists, prevent transactions as well as protecting consumer privacy and require consideration of whether alternate approaches can protect privacy interests through a more limited restriction.

In light of the foregoing and in order to satisfy constitutional requirements, to the extent that the FCC determines that it will proceed to develop rules under the TCPA that are based on the establishment of a national do-not-call registry, the FCC must consider how to minimize the likelihood that the registry will prevent economic transactions as opposed to invasions of privacy interests. In this regard, the FCC should broadly define the statutory exclusions from the definition of telephone solicitation in the TCPA for “established business relationship” and “prior express invitation or permission.” In addition, in order to maintain the balance that the FCC strikes for constitutional purposes, to ensure that the specific requirements that a national do-not-call list must meet under the TCPA are adhered to and that the FCC’s resolution of the specific factors that the FCC is to consider under the TCPA are implemented, the FCC must work with the FTC to ensure that there is only a single national do-not-call list that is operated under a single set of rules, and that the FCC rules preempt any conflicting state requirements to the maximum extent possible under the TCPA.

B. A National Do-Not-Call Registry with Broad Exemptions

The TCPA definition of “telephone solicitation” excludes a call to a person with an “established business relationship” with the caller or to any person based on a “prior express invitation or permission.”⁸ Currently, these exceptions apply to the company-specific do-not-call provision adopted by the FCC under the TCPA. These same exemptions would apply to any national do-not-call registry created. Both of these exceptions demonstrate congressional recognition of the need to protect transactions while protecting individual privacy, both from a constitutional standpoint under *Central Hudson* and to carry out the directive in the TCPA that the protection of privacy be carried out in an efficient, effective and economic manner.⁹

The importance of these exceptions is particularly evident in the case of financial services where consumers’ changing economic situations, changing market conditions and the complexity of financial transactions place a strong emphasis on the importance of ongoing service to the customer. However, both the FCC’s current definition of established business relationship and the exception

⁷ *Id.*

⁸ 47 U.S.C. § 227(a)(3).

⁹ 47 U.S.C. § 227(c)(2).

that the FTC has provided in its TSR for established business relationship are too narrow because they do not include exceptions for affiliates and business partners of a company with an established business relationship with the consumer.¹⁰

Any national do-not-call list should provide an exception to permit a financial institution and all of its affiliates to contact individuals with whom the financial institution has an existing business relationship. Financial services often are required by law to be conducted in separate companies in order to satisfy federal regulatory requirements. For example, banks are limited in their abilities to provide securities and insurance products and services, and insurance and securities companies are prohibited from providing certain banking services. These requirements persist in order to preserve the separate regulatory regimes for the banking, insurance and securities businesses even though Congress recently recognized in the Gramm-Leach-Bliley Act that there are synergies between these businesses and overturned a sixty-year old ban on certain of these activities being conducted within the same holding company. One of the principal synergies that motivated the Gramm-Leach-Bliley Act was the ability of providers of banking, securities and insurance services to cross sell to their respective customers, and thereby to provide those customers with “one stop shopping” for financial services. Accordingly, there is a significantly higher likelihood that a call from an affiliate of a financial services company will result in an actual transaction than a call from a third party that is a stranger to the consumer.

Similarly, this exception also should extend to business partners, such as co-brand and affinity partners. For instance, oftentimes, banks issue credit cards that carry names of other parties, including other banks, generally known as agent banks. Any national do-not-call list should not limit calls by affiliates and business partners that are required to be legally separate from the entity delivering the initial product or service to the consumer, particularly where these entities are identified to the consumer on a co-branded or coordinated basis.

¹⁰ Although not stated in the FTC’s TSR, the supplemental information accompanying the TSR states that some, but not all, affiliates will be able to take advantage of the established business relationship exemption. The supplemental information explains that the FTC “intends that the affiliates that fall within the exemption will only be those that the consumer would reasonably expect to be included given the nature and type of goods or services offered and the identity of the affiliate.” 68 Fed. Reg. 4580, 4594 (Jan. 29, 2003). The FTC encourages companies to question whether consumers likely would be surprised if consumers received a call from a company that is an affiliate or subsidiary, and whether consumers would find the call “inconsistent with having placed their telephone number on the national ‘do-not-call’ registry.” *Id.* Not only is this standard vague and unworkable in practice, its placement in the supplemental information raises questions as to the degree to which the FTC will feel itself free to change its view on this issue in the future without the benefit of the public notice and comment that would be required if the language was set forth in the TSR itself.

The FCC should also clarify the definition of the “prior express invitation or permission” exception in a way that avoids limitation of the form of invitation or permission. Specifically, the method of invitation or permission ought to be broad and should include both written or oral expressions, as well as the existence of a prior business relationship. For instance, if a customer walks into a bank to apply for a loan, and the customer is then asked if he or she would like to receive information on insurance, and the customer responds in the affirmative, this oral response should suffice as prior express permission. The bank then should be able to give the customer’s name to a provider of insurance so that the provider of insurance may call the bank customer. In these cases, the likelihood is high that the call will result in providing the consumer with useful information or will result in a transaction rather than an invasion of privacy.

Moreover, the prior express invitation or permission exception and the established business relationship exception should apply until the customer requests to be placed on the caller’s company-specific do-not-call list. This will avoid arbitrary time limits that must be tracked by telemarketers and that may not reflect the seasonality or cyclicity of products or services.

C. A Single National Standard

The nature of the balancing of interests that is necessary for a national do-not-call list to pass constitutional muster under *Central Hudson* raises serious questions as to whether there can be two sets of standards for such lists at the federal level where the interest being protected is the privacy interest of individuals. The existence of an exception on one federal list but not on another would be a strong indication that either the list containing the exception did not adequately advance the government’s privacy interest, or that the government interest behind the list omitting the exception could be served as well by a more limited restriction that recognized the exception.¹¹ Either situation would result in one of the lists failing the *Central Hudson* standards.

More fundamentally, Visa cannot imagine that Congress could possibly have contemplated that two federal agencies would create separate national do-not-call lists or separate exceptions from, or procedures for, such lists. This conclusion is reinforced by the obviously differing focuses of the acts under which the FTC and the FCC are proceeding. The TCFAPA is focused on deceptive and abusive practices. The congressional findings in the TCFAPA concentrate on fraud. The TCFAPA specifically does not address, or even mention, the creation of a national do-not-call list. In contrast, the TCPA specifically addresses the issue of protecting the right of consumers to avoid

¹¹ Although different states may be viewed as valuing privacy differently, it is more difficult to reconcile conflicts between two agencies of the federal government as to the value of privacy from unwanted telemarketing calls, at least unless those differing values are clearly articulated.

receiving unwanted telephone solicitations through a national do-not-call list. Further, the TCPA establishes factors that the FCC must consider in achieving this protection. The TCPA includes a list of five considerations in evaluating the need to protect privacy interests,¹² over a dozen requirements for a single national do-not-call list¹³ and a further list of considerations for the do-not-call list.¹⁴ The FTC's TSR does not address these issues, and, in some cases, such as charging telemarketers for using the list, there may be legal impediments to the FTC meeting the requirements of the TCPA. Clearly, Congress contemplated that any such list would be created under these criteria with the benefit of the expertise of the agency to which the TCPA is addressed.

As a result of the differing substantive focuses of the TCFAPA and the TCPA and the specific requirements for a national do-not-call list in the TCPA, it is evident that the FCC should lead any national do-not-call list, while the FTC should concentrate on those aspects of its proposal that deal with abusive or deceptive telemarketing practices. Therefore, in order to prevent two conflicting lists or conflicting standards applicable to lists and to ensure that a single list is established under the criteria specified by Congress for such lists, Visa urges the FCC to work with the FTC to ensure that a national do-not-call list is created under the TCPA factors.

D. Preemption

In addition to multiple federal agencies addressing do-not-call lists at the national level, several states are pursuing or maintaining their own telemarketing statutes and thereby arguing for joint enforcement of a national do-not-call list with state do-not-call lists. Although states may value privacy differently, state lists that operate under differing standards nevertheless raise questions as to whether the differing standards meet the *Central Hudson* tests. In addition, the existence of specific requirements and considerations in the TCPA means that state do-not-call lists that do not conform to any rules adopted by the FCC necessarily conflict with the TCPA as implemented by the FCC. Although it may be possible to comply with both the state and the federal requirements at the same time, because of the detailed requirements and considerations incorporated into the TCPA, it appears that Congress intended the FCC to balance carefully competing interests and that a state list that conflicts with action taken by the FCC to address privacy interests in accordance with the TCPA would frustrate this balance and therefore the purpose of the TCPA. Consequently, Visa believes that all state laws purporting to establish do-not-call lists for the purposes of protecting the privacy of state residents that are inconsistent with any action taken by the FCC are preempted by the TCPA because such state laws stand as an obstacle to

¹² 47 U.S.C. §§ 227(c)(1)(A)-(E).

¹³ 47 U.S.C. § 227(c)(3).

¹⁴ 47 U.S.C. § 227(c)(4).

the balance that Congress sought to achieve. This preemption applies, notwithstanding the savings clause in the TCPA, which appears to permit states to adopt more restrictive requirements or regulations, but only on an *intrastate* basis.¹⁵

This view is supported by *Geier v. American Honda Motor Co., Inc.*,¹⁶ where the U.S. Supreme Court found that the National Traffic and Motor Vehicle Safety Act of 1966, which provided both a preemption provision and a savings clause, preempted state tort actions even though the savings provision exempts common-law liability cases. The Supreme Court concluded, “the savings clause (like the express pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles.” The Supreme Court further noted that the Court has repeatedly declined “to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law. . . . And we conclude that the saving clause foresees—it does not foreclose—the possibility that a federal safety standard will pre-empt a state common-law tort action with which it conflicts.”¹⁷ The Supreme Court went on to state that this preemption applied to both state laws where it was impossible for private parties to comply with both state and federal law and to state laws that stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress—whether that obstacle goes by the name of conflicting, contrary to, repugnance, difference, irreconcilability, inconsistency, violation, curtailment or the like.¹⁸ Under *Geier*, a claim cannot be brought under state law when the federal government (in this case, the Department of Transportation) has promulgated regulations and has already established specific compliance standards.

Similarly, to the extent that the FCC has established regulations governing telemarketing calls under the TCPA, as it already has, and these regulations implement specific requirements established by Congress and require the consideration of specific factors identified by Congress, not to mention the weighing of constitutional considerations, state do-not-call laws are preempted to the extent that they depart from the careful balance struck by the FCC. Notwithstanding the existence of the savings clause in the TCPA, this is true because, as the Supreme Court ruled in *Geier*, the presence of a savings clause does not bar ordinary preemption principles.

Nevertheless, if the FCC believes that it is bound to implement the savings clause in the TCPA, it should only do so in accordance with the express terms of that clause. While the TCPA contains a savings clause that refers to intrastate

¹⁵ 47 U.S.C. § 227(e)(1).

¹⁶ 529 U.S. 861, 867-68 (2000).

¹⁷ *Id.* at 869-70.

¹⁸ *Id.* at 873.

calls, thereby implying that state requirements on interstate calls are preempted,¹⁹ the FCC's current rule implementing the TCPA does not provide further clarification of preemption. The TCPA provision clearly demonstrates that Congress, at the very least, intended to preempt the field with respect to *interstate* calls, and that any application of a state do-not-call list to interstate calls would be preempted under both the express statutory language and constitutional preemption standards.²⁰ This view is consistent with FCC staff commentary letters, which have explained that the Communications Act of 1934 "precludes [a State] from regulating or restricting interstate commercial telemarketing calls."²¹

Regardless of whether the FCC views the TCPA as preempting all state do-not-call lists or merely the application of those lists to interstate calls, it is vital that the FCC clearly state its views so that the scheme for the TCPA is implemented as intended by Congress, and so that companies engaged in telemarketing can determine their compliance responsibilities. Uncertainty as to the application of state laws will inevitably lead to restrictions on commercial speech that go beyond the necessary to protect privacy interests, as determined by the FCC, and that do not meet the standards contemplated by Congress under the TCPA.

It would benefit both consumers and telemarketers to operate under a single national do-not-call list without individual state do-not-call lists in effect. Many industry representatives have commented in support of a national do-not-call registry, providing that such a registry preempts state do-not-call lists. Operating under one national list would eliminate confusion that results from the many state do-not-call lists in effect with diverse exemptions and penalties for violation. Kathryn D. Kohler, an assistant general counsel with Bank of America, recently commented that "[i]t is becoming increasingly difficult to reconcile and comply with the growing number of state 'do-not-call' laws and to navigate the myriad state rules governing applicability, exceptions, information provided, formatting, and timing. . . . When conducting nationwide marketing activities, even the most conscientious marketer finds it difficult to ensure that telemarketing lists meet all the various state rules and have been timely scrubbed against the

¹⁹ 47 U.S.C. § 227(e)(1).

²⁰ In *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995), a court questioned whether Congress intended to preempt the field with the TCPA; however, the court did not specifically address the issue of interstate calls. The *Van Bergen* court noted that the TCPA savings clause "merely states that more restrictive intrastate requirements are not preempted." *Id.* at 1547. The *Van Bergen* court further explained that "[i]f Congress intended to preempt other state laws, that intent could easily have been expressed as part of the same provision." *Id.* at 1548. This holding would render the plain language of the savings clause meaningless—there would be no need to save state law from preemption unless at least some state law was preempted. In addition, this holding is inconsistent with *Geier*, and must be viewed as simply wrong.

²¹ See Letter from Geraldine A. Matise, Chief, Network Services Div., Common Carrier Bureau, to Ronald Guns, Jan. 26, 1998.

most current applicable state lists.”²² While Visa strongly urges the FCC to clarify the preemption of state do-not-call lists, Visa recognizes that state lists could very well be incorporated into a national do-not-call list, thereby providing those consumers who were formerly on state do-not-call lists with the continued protection against unwanted telemarketing calls.

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In conclusion, Visa appreciates the opportunity to submit additional comments on this important topic. If you have any questions concerning these comments, or if we may otherwise be of assistance in connection with this matter, please do not hesitate to contact me at (415) 932-2182.

Sincerely,

Russell W. Schrader
Senior Vice President and
Assistant General Counsel

²² See Rob Blackwell, *Industry Split on Idea of National No-Call List*, AM. BANKER, Jan. 15, 2003, at 4.